

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(Filed: April 4, 2012)

ROXANNE DIPANNI

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v.

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C.A. No. PC 2009-7410

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NEW CENTURY MORTGAGE CORPORATION; DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; HOME EQ SERVICING and NICHOLAS BARRETT & ASSOCIATES

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DECISION

Rubine, J. Defendants New Century Mortgage Corporation (“New Century”), Deutsche Bank National Trust Company (“Deutsche Bank”), Mortgage Electronic Registration Systems, Inc., (“MERS”), and Home Eq Servicing (“Home Eq”) (collectively, “Defendants”)¹ jointly moved to dismiss Plaintiff Roxanne Dipanni’s (“Plaintiff”), formerly known as Roxanne Moricas, complaint (“Complaint”) to quiet title to certain real property thus rendering the real property marketable. On April 20, 2010, Associate Justice Ragosta converted Defendants’ Motion to Dismiss pursuant to Rule 12(b)(6) to a Motion for Summary Judgment under Rule 56. After the submission of supplemental memorandums by the Plaintiff and Defendants, the case was heard by the Honorable Justice Rubine as a Motion for Summary Judgment and taken under advisement.

¹ Defendant Nicholas Barrett & Associates was voluntarily dismissed without prejudice.

I

Undisputed Facts & Procedural History

On November 2, 2006, Plaintiff executed a promissory note (“Note”) in favor of lender New Century, for \$595,000. Plaintiff contemporaneously secured the Note by executing a mortgage on her real property at 140 White Birch Circle, Scituate, Rhode Island (“Property”). The mortgage was recorded in the land evidence records for the Town of Scituate on November 7, 2006. The mortgage instrument provides that “Borrower does hereby mortgage, grant and convey to MERS, (solely as nominee for Lender and Lender’s successors and assigns) and to the successors and assigns of MERS, with Mortgage Covenants upon the Statutory Condition and with the Statutory Power of Sale.” (Defs.’ Ex. B at 3, (hereinafter, “Mortgage”).) Plaintiff signed the Note and Mortgage as mortgagor and obligor under the Note. (Mortgage at 1-3.)

Sometime thereafter, New Century indorsed the Note in blank. On April 2, 2007, New Century filed a Chapter 11 petition in Bankruptcy Court.

On February 2, 2009, MERS, as mortgagee and nominee for New Century, executed an assignment of the Mortgage to Deutsche Bank, recording the assignment in the land evidence records for the Town of Scituate. See Defs.’ Ex. D. Subsequently, Plaintiff failed to make timely payments under the terms of the Note. On September 8, 2009, Nicholas Barrett & Associates, in its capacity as attorney for Deutsche Bank, sent a notice of default and acceleration of all payments to Plaintiff. See Defs.’ Ex. F; see also Defs.’ Ex. E at 9. Plaintiff failed to comply with the notice and subsequently, on October 29, 2009, Deutsche Bank conducted a foreclosure sale on the Property. Deutsche Bank

was the successful bidder at the foreclosure sale, purchasing the property for \$508,135.69, and thereafter recording its foreclosure deed evidencing it as the current holder of fee simple title to the Property. See Defs.’ Ex. E.

On December 30, 2009, Plaintiff filed the Complaint, seeking nullification of the foreclosure deed and return of title to her. See Compl. As a result, Defendants filed a Motion to Dismiss under Rule 12(b)(6). Subsequently, Plaintiff filed an objection to Defendants’ Motion. At a hearing before Justice Ragosta, matters outside of the pleadings were presented and therefore, the Court converted the Motion to Dismiss pursuant to Rule 12(b)(6) to a Motion for Summary Judgment pursuant to Rule 56, continuing the hearing to give the parties reasonable opportunity to present all necessary materials. After each party submitted supplemental memoranda in support of the Motion for Summary Judgment,² this Court heard oral arguments. This Court then took the matter under advisement.

II

Standard of Review

This Court will only grant a motion for summary judgment if “after reviewing the admissible evidence in the light most favorable to the nonmoving party[.]” Liberty Mut. Ins. Co. v. Kaya, 947 A.2d 869, 872 (R.I. 2008) (quoting Roe v. Gelineau, 794 A.2d 476, 481 (R.I. 2002)), “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Super.

² Plaintiff appears to have mislabeled her Memorandum as a Memorandum of Law in Support of Plaintiff’s Motion for Summary Judgment. It should be labeled as a Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment as Plaintiff was the party opposing the Motion to Dismiss prior to conversion.

R. Civ. P. 56(c).

The nonmoving party “has the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions.” Liberty Mut., 947 A.2d at 872 (quotation omitted). To meet this burden, “[a]lthough an opposing party is not required to disclose in its affidavit all its evidence, he [or she] must demonstrate that he [or she] has evidence of a substantial nature, as distinguished from legal conclusions, to dispute the moving party on material issues of fact.” Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998) (quotation omitted).

III

Discussion

Upon conversion of Defendants’ Motion to Dismiss under Rule 12(b)(6), Defendants presented to the Court a Memorandum in Support of Motion for Summary Judgment. Attached to Defendants’ Memorandum, as exhibits, are documents that relate to the instant motion; however, these documents are outside of the pleadings and are not the subject of stipulation or attached to an affidavit establishing the authenticity of same. The Court cannot consider exhibits in support of or in opposition to a motion for summary judgment as genuine merely because they are “attached” to a motion or a memorandum. Summary Judgment is a proceeding in which the proponent must demonstrate by affidavits, depositions, pleadings and other documents before the court that he or she is entitled to judgment as a matter of law that there are no genuine issues of material fact. Palmisciano v. Burrillville Racing Ass’n, 603 A.2d 317 (R.I. 1992); see also Nihola v. John Hancock Mut. Life Ins. Co., 471 A.2d 945 (R.I. 1984) (when the

moving party in his affidavit fails to establish the absence of a material issue of fact, the trial justice should deny the motion if the movant is entitled to judgment as a matter of law.); Capital Properties, Inc. v. State, 749 A.2d 1069 (1999). Furthermore, a motion for summary judgment “must establish that the proponent of the motion is entitled to judgment as a matter of law and that there are no issues of fact for a jury or other trier of fact to determine or resolve.” Palmisciano v. Burrillville Racing Ass’n, 603 A.2d 317, 320 (R.I. 1992). Accordingly, the moving parties have not met their burden under Rule 56(b). Since the material facts have not been established as required by Rule 56, the Defendants’ Motion for Summary Judgment must be denied.

IV

Conclusion

Defendants’ Motion for Summary Judgment is denied without prejudice. Counsel for the prevailing party shall submit an Order in accordance with this decision.